PT 98-80
Tax Type: PROPERTY TAX
Issue: Charitable Ownership/Use

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

VICTORY GARDENS THEATER, APPLICANT	**95-16-0914**
	Real Estate Exemption for 1995 Tax Year
v.	**P.I.N.: 14-33-110-003**
DEPARTMENT OF REVENUE STATE OF ILLINOIS	**Cook County Parcel**
	Alan I. Marcus, Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Mr. Thomas McNulty and Ms. Angela E. Dietz of Neal, Gerber & Eisenberg appeared on behalf of the Victory Gardens Theater.

SYNOPSIS: These proceedings raise the following issues: (1) does applicant qualify as an "institution of public charity" within the meaning of 35 **ILCS** 200/15-65;[1] (2) should real estate identified by Cook County Parcel Index Number 14-33-110-003 (hereinafter "subject parcel" or the "subject property") be exempt from 1995 real estate taxes under 35 **ILCS** 200/15-65; (3) if said property is not so exempt, does applicant qualify as a "school" within the meaning

1. In People ex. rel. Bracher v. Salvation Army, 305 Ill. 545 (1922), the Illinois Supreme Court held that the issue of property tax exemption necessarily depends on the statutory provisions in force during the time for which the exemption is claimed. This applicant seeks exemption from 1995 real estate taxes. Therefore, the applicable provisions are those found in the Property Tax Code, 35 **ILCS** 200/1 *et seq.*

of 35 **ILCS** 200/15-35; (4) if applicant does not so qualify, does the subject parcel otherwise qualify for exemption under 35 **ILCS** 200/15-35; and (5) does the Illinois Department of Revenue's (hereinafter the "Department") exemption denial violate applicant's equal protection rights or the principle of uniformity?

The controversy arises as follows:

Victory Gardens Theater (hereinafter "VGT" or the "applicant") filed a Real Estate Exemption Complaint with the Cook County Board of (Tax) Appeals (hereinafter the "Board") on March 22, 1996. (Dept. Group. Ex. No. 1, Doc. A). The Board reviewed applicant's complaint and thereafter recommended that "no action" be taken because another appeal was pending before the Department. (Dept. Gr. Ex. No. 1, Doc. B).[2]

On October 12, 1997, the Department issued a determination denying the requested exemption on grounds that the subject property was neither in exempt ownership nor in exempt use. (Dept. Ex. No. 2). Applicant subsequently filed a timely request as this denial (Dept. Ex. No. 3) and thereafter presented evidence at a formal administrative hearing. Following submission of all evidence and a careful review of the record, I recommend that the Department's denial be affirmed.

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2. This particular appeal, involving Departmental docket No. 94-16-1367, is currently pending before the Department pursuant to the Remand Order issued by Judge Alexander P. White on August 13, 1998. However, Judge White's Order, entered in that Administrative Review matter docketed in the Circuit Court of Cook County as 96 L 51154, technically does not affect this proceeding because it pertains to a previous assessment year. Jackson Park Yacht Club v. Department of Local Government Affairs, 93 Ill. App.3d 542 (1st Dist. 1981) (A determination of exempt or taxable status for one year is not res judicata for any other tax year even where ownership and use remain the same).

FINDINGS OF FACT:

A. Preliminary Considerations

1. The Department's jurisdiction over this matter and its position therein, namely that the subject property was neither in exempt ownership nor in exempt use throughout the 1995 assessment year, is established by the admission into evidence of Dept. Ex. No. 2.
2. The subject property is located at 2257-2263 North Lincoln Ave, Chicago, IL 60614 and improved with a 20,000 square foot building that features two floors and a partial basement. Dept. Group Ex. No. 1, Doc. B; Applicant Ex. No. 2.
3. The Community Arts Foundation, (hereinafter "CAF"), an Illinois not-for-profit corporation that owned and operated the Body Politic Theater, assumed ownership of the subject property via a trustee's deed dated December 20, 1968. Applicant Ex. No. 5.
4. This deed vested CAF with 100% of the beneficial interest in the subject property. Legal title, however, remained with the trustee, Aetna. *Id*.
5. CAF assigned 53% of its beneficial interest in the land trust to applicant on April 17, 1984. It subsequently assigned the remaining 47% of its beneficial interest in the land trust to VGT on August 3, 1995. *Id*; Tr. pp. 32-34.
6. This absolute assignment of beneficial interest was part of a transaction in which, *inter alia*, VGT: (1) purchased 's portion of the subject property; (2) purchased all tangible personal property, including furnishings, equipment, theatrical equipment, etc, located at the subject property that was used in connection with the theater

business; and (3) assumed the landlord's interest in any and all leases[3] that held on the subject property as of the date of closing; *Id*; Tr. pp. 32-34.

B. Applicant's Corporate and Fiscal Structures

7. VGT was incorporated under the General Not For Profit Corporation Act on August 12, 1974. Its Articles of Incorporation and by-laws indicate, *inter alia*, that VGT's corporate purposes are to: (1) be organized and operated exclusively for charitable, literary and educational purposes consistent with Section 501(c)(3) of the Internal Revenue Code of 1954 and its successor provisions; (2) stimulate, promote and develop interest in the dramatic arts and the study of drama; (3) support the development of talent, theater and drama in Chicago and improve the quality of the dramatic arts in America; (4) increase knowledge and appreciation of the dramatic arts and to advance the national culture in the field of the dramatic arts; (5) provide support facilities for research, education, and instruction in the dramatic arts of the theater; and (6) develop the forgoing through, among other means, the production of drama and workshops, schools, and training centers for actors, directors and playwrights. Applicant Ex. No. 6.

8. The Internal Revenue Service issued applicant an exemption from federal income tax on September 4, 1975. The Service issued this exemption pursuant to Section 501(C)(3) of the Internal Revenue Code and based same on its conclusion that applicant qualified as an organization described in Section 509(a)(2) thereof. *Id*.

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3. For further information about these leases, *see*, Findings of Fact 25-28, *infra* at pp. 10-11.

9. The Department issued applicant an exemption from payment of Illinois Use and related sales taxes on October 30, 1995. The Department based this exemption on its conclusion that applicant qualified as a "not-for profit 501(C)(3) organization for the presentation of musical or theatrical works." [sic.] *Id.*

10. Applicant has no capital stock or shareholders. Its fiscal year begins July 1 of each calendar year and ends the ensuing June 30. *Id.*

11. Applicant obtained income from the following sources during the fiscal year ended June 30, 1995: [4]

SOURCE	**AMOUNT**	**% OF TOTAL** [5]
Revenue and Support		
Admissions	$ 395,200.00	38%
Service Fee Income	$ 41,597.00	4%
Tuition	$ 62,028.00	6%
Interest	$ 213.00	<1%
Concessions, Net of Direct Expenses	$ 2,063.00	<1%
Tour	$ 20,000.00	2%
SOURCE (CONT'D)	**AMOUNT**	**% OF TOTAL**

4. The financial statements submitted as Applicant Ex. No. 1 present VGT's financial structure according to applicant's fiscal years. Such an approach may serve legitimate accounting purposes. Nevertheless, technical considerations (to wit, the six-month difference in periods covered by applicant's fiscal year and the calendar-based 1995 assessment year) render this approach somewhat ineffective in the present context.

This caveat is important because the present record does not contain a calendar-based breakdown of applicant's income and expenses for the 1995 assessment year. Absent this information, I must consider the aforementioned financial statements to be the most probative evidence of applicant's fiscal structure. Therefore, I shall use the information contained in both of these statements (which, despite the aforestated limitation, do cover the entire 1995 assessment year) when analyzing fiscal issues.

5. All percentages shown herein are approximations derived by dividing the amounts shown in the relevant category by the total revenues shown on the last line of the second column. Thus, $395,200.00/1,051,378.00=.3759(rounded four places past the decimal) or 38%.

Rental Income	$ 39,419.00	4%
Royalties	$ 3,227.00	<1%
Total	**$563,747.00**	**54%**
Grants and Contributions		
Unrestricted	$ 383,757.00	37%
Restricted	$ 10,000.00	<1%
Total Grants and Contributions	**$393,757.00**	**37%**
Special Events		
Proceeds	$ 200,481.00	19%
Expenses	($106,607.00)	N/A
Net Income From Special Events	**$ 93,874.00**	**9 %**
TOTAL REVENUES AND SUPPORT	**$1,051,378.00**	

Applicant Ex. No. 1.

12. Applicant's expenses for the same fiscal year were as follows:

EXPENSE	**AMOUNT**	**% OF TOTAL**
Program Services		
Theater	$667,532.00	65%
Theater Center[6]	$ 39,188.00	4%
Studio	$ 0.00	
Tour	$ 16,101.00	2%
Other Program Expenses	$ 6,390.00	<1%
Total Program Services	**$729,211.00**	**71%**

6. For further information about applicant's Theater Center, wherein it offers instructional programming pertaining to the performing arts, *see*, Findings of Fact 49-59, *infra* at pp. 16-18.

EXPENSE (CONT'D)	AMOUNT	% OF TOTAL
Supporting Services		
Administration	$297,482.00	29%
Fund Raising	$ 4,806.00	<1%
Total Supporting Services	**$302,288.00**	**29%**
TOTAL EXPENSES	**$1,031,499.00**	

Id.

13. Applicant obtained revenue from the following sources during the fiscal year ended June 30, 1996:

SOURCE	AMOUNT	% OF TOTAL
Revenue and Support		
Admissions	$457,084.00	35%
Service Fee Income	$ 20,624.00	2%
Tuition	$ 57,770.00	4%
Interest	$ 1,558.00	<1%
Concessions, Net of Direct Expenses	$ 3,347.00	<1%
Tour	$ 0.00	0
Rental Income	$118,861.00	9%
Royalties	$ 3,412.00	<1%
Total	**$662,656.00**	**50%**
Grants and Contributions		
Unrestricted	$495,200.00	37%
Restricted	$ 50,000.00	4%
Total Grants and Contributions	**$545,200.00**	**41%**
Special Events		
Proceeds	$220,562.00	17%
Expenses	(104,149.00)	N/A
Net Income From Special Events	**$116,413.00**	**9%**
TOTAL REVENUES AND SUPPORT	**$1,324,269.00**	

Id.

14. Applicant's expenses for the same fiscal year were as follows:

EXPENSE	**AMOUNT**	**% OF TOTAL**
Program Services		
Theater	$ 838,170.00	67%
Theater Center (Classes)	$ 41,128.00	3%
Studio	$ 23,703.00	2%
Tour	$ 4,090.00	<1%
Other Program Expenses	$ 14,794.00	1%
Total Program Services	**$921,885.00**	**74%**
Supporting Services		
Administration	$310,562.00	25%
Fund Raising	$ 14,405.00	1%
Total Supporting Services	**$324,967.00**	**26%**
TOTAL EXPENSES	**$1,246,852.00**	

Id.

D. Use Issues

15. The subject property is improved with a 20,000 square foot building that features two floors and a partial basement. Applicant Ex. No. 3; Tr. pp. 26.

16. The lower level (or first floor) contained lobby, a box office area, one large (195-seat) main stage theater, a separate but smaller (60-seat) studio theater, restrooms and a restaurant throughout the 1995 assessment year. *Id.*

17. The upper level (or second floor) contained a lobby area, one large (198 seat) theater, a separate but smaller (60 seat) studio theater, offices, a rehearsal room, a dressing room, storage space, a stagehand's area and restrooms. *Id.*

18. Applicant customarily used the lower level main stage theater for its own productions and rented the other spaces to local and visiting professional theater companies. Applicant Ex. No. 10.

19. The first-floor restaurant occupied 3,300 net rentable square feet (or 16.5% of the total building area)[7] and was operated by the 2263 N. Lincolon Corporation, an Illinois Corporation (hereinafter "2263"). Applicant Ex. Nos. 3, 4.

20. 2263 operated the restaurant throughout the 1995 assessment year pursuant to a lease in which applicant held the landlord's interest. Applicant Ex. No. 4; Tr. pp. 27-28.

21. The lease provided, *inter alia*, that: (1) the term thereof was to run from June 1, 1994 through May 31, 2009, unless terminated by procedures detailed in the lease; (2) 2263, as lessee, was to pay applicant, as lessor, base rent in the amount of $3,700.00 per month during the period that began June 1, 1994 and ended December 31, 1995; (3) 2263 was also to pay an amount equal to 1/3 of the amount by which real estate taxes for the subject property, payable in any calendar year that falls within the term of the lease, exceeded the 1993 real estate taxes for such property; (4) 2263 was to use the leasehold for no purpose other than operation of a first class, table service restaurant and tavern for the sale of food and alcoholic beverages; and, (5) applicant was authorized to terminate 2263's right of possession or the entire lease if: (a) the lessee defaulted in the prompt payment of rent; and (b) such default continued for a period of ten days. Applicant Ex. No. 4.

22. Applicant used the remaining (non-leased) portion of the first floor for theater productions, rehearsals and classes throughout the 1995 assessment year. Applicant Ex. No. 10.

23. CAF occupied and used the entire second floor, under terms of its 47% beneficial interest in the subject property, from April of 1984 until August of 1995. It

7. 3,300/20,000 = .165 or 16.5%.

surrendered this remaining share of its ownership rights to applicant via an absolute assignment of beneficial interest dated August 3, 1995. Applicant Ex. No. 5.

24. This assignment effectively vested applicant with ownership of the entire subject parcel and thereby allowed it to control usage of the upper and lower level areas. Applicant Ex. Nos. 5, 8.

25. The assignment further provided, *inter alia*, for applicant to assume the landlord's interest (formerly held by CAF) in two separate leases affecting the second floor main stage auditorium and the dressing room adjacent thereto. Applicant Ex. No. 5.

26. The first lease was with Jesse Dienstag, a private individual, for presentation of a stage production entitled "ManCard: A Journey Through The Mind Of The Sensitive White Male." This lease was originally scheduled run from June 2, 1995 until July 22, 1995. However, the parties subsequently agreed that the termination date be extended to August 26, 1995. *Id*.

27. The second lease was with Ann Noble, a private individual, for presentation of a stage production entitled "And Neither Have I Wings To Fly." This lease was originally scheduled to run from April 16, 1995 until June 4, 1995. However, the parties executed an amendment that prolonged the termination date to September 12, 1995. *Id*.

28. Both leases provided, *inter alia*, that: (1) the lessees were to make rental payments throughout the terms of their respective leases and pay additional sums certain as security deposits; (2) the amount of each rental payment was equal to a fixed sum

certain[8] for each performance; (3) all rental payments were payable on a weekly basis, except that: (a) payment for the last week's tenancy was to be made at the same time the leases were executed; and (b) payment for the first week's rental was to be made on a date certain that fell within a few days of the start of each tenant's leasehold; and (4) the lessees' rights of occupancy were to terminate in the event that the lessees: (a) failed to make any rental payments on the date such payments were due; and (b) continuously defaulted in making such payments for a period of three days. *Id*.

29. Other theater production companies, including, *inter alia*, the Buffalo Theater Ensemble, Jim Sullivan and the Ben Hecht Company, DePaul University Theater Department and Roadworks Productions, entered into lease agreements which enabled them to perform at the subject property during applicant's 1995-1996 fiscal year. *Id*.

30. Applicant did not submit the leases under which any or all of these companies performed. It did, however, submit a year-end report indicating that: (1) there were nine rental productions during the 1995-1996 season; (2) applicant's rental fees ran from $500.00 to $2,500.00 per week; and (3) aggregate attendance for the nine rental productions was 12,343 patrons. Applicant Ex. No. 8.

31. Applicant presented four rental productions during its 1994-1995 fiscal year. All of these productions were performed in the first floor studio theater. Rental fees for each production and aggregate attendance thereat were unspecified. *Id*.

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8. For exact rental amounts and other details as to the terms of both leases, *see*, Applicant Ex. No. 5.

32. VGT also presented one non-rental production per fiscal year in the lower level studio theater. The production given during the 1994-1995 fiscal year had an average ticket price of $7.76 for 21 performances and drew an aggregate attendance of 378 patrons. The one given during applicant's 1995-1996 fiscal year had an average ticket price of $10.87 for 27 performances and drew aggregate attendance of 1,006 patrons. *Id.*

33. VGT additionally presented 5 productions in its (lower level) main stage theater during the 1994-1995 fiscal year. Average ticket price for each of the 233 performances of these five individual productions[9] was $14.98. Aggregate attendance at the 233 performances was 28,824. *Id.*

34. VGT presented 5 productions in its (lower level) main stage theater during the 1995-1996 fiscal year. Average ticket price for each of the 245 performances of these five individual productions was $14.32. Aggregate attendance at the 233 performances was 29,744. *Id.*

35. Applicant also presented two rental productions in one of the main stage theaters[10] during its 1995-1996 fiscal year. Rental fees for these productions and aggregate attendance thereat were unspecified. *Id*

36. Applicant adhered to the following discount ticket policies during its 1994-1995 fiscal year: (1) Tickets for the five productions presented in its first-floor main stage theater were available to: (a) "Rush" (or Theater Center)[11] students at 1/2 price,

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9. The record does not indicate exactly how many performances of each individual production were presented during the 1994-1995 fiscal year.

10. The record does not indicate which of the two (first or second floor) main stage theaters was used for the rental productions.

11. For further information about applicant's Theater Center, *see*, Findings of Fact 50-60, *infra* at pp. 16-18.

provided that they presented a student ID and arrived half hour before curtain time; (b) those purchasing tickets through Hottix, a ticket cooperative operated by the League of Chicago Theaters, at 1/2 price, but only if said tickets were purchased the day of a performance; (c) students at $3.00 off; (d) community groups, neighborhood organizations, hospitals, veterans organizations and other non-profit groups free of charge, provided that they attended on "Community Nights;"[12] and (e) students and senior citizens at $8.00, provided that they attended a Wednesday matinee; (2) patrons who could not afford full price tickets and could not avail themselves of any of the above discounts or purchase tickets through Hottix could be invited to a Community Night; and (3) those who were at the box office, wanted tickets for that particular performance but could not afford to pay full price or attend another performance, could pay what they could afford or be given a ticket free of charge, provided that there were seats available. Applicant Ex. No. 10.

37. VGT adhered to the same basic policies during its 1995-1996 fiscal year except that "Rush" students could not obtain 1/2 price tickets unless they appeared at the box office with their students IDs no earlier than one half hour before curtain time. *Id*.

38. The above policies were always subject availability, which means that VGT would not provide free or reduced tickets to sold out performances. Tr. pp. 51-52.

39. Despite this limitation, applicant gave away approximately 209 free tickets, having a face value of $15.00 per ticket, during its 1994-1995 and 1995-1996 fiscal years. It also provided approximately 1,788 subsidized or half-priced tickets, valued at $7.50

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12. The record does not indicate how many "Community Nights" applicant held in its 1994-1995 or 1995-1996 fiscal years.

apiece, to various student, senior citizen or community groups during those fiscal years. Applicant Ex. No. 9; Tr. pp. 43-52.

40. Some of the organizations which applicant supplied with free or reduced-priced tickets during its 1994-1995 and 1995-1996 fiscal included: the Oak Lawn Park District, Boys and Girls Clubs from Lawndale, Lathrop and the Robert Taylor Homes, the Good News Soup Kitchen, the City of Chicago Department on Aging, Sherwood Manor, Northwestern University, the Inspiration Café, Lincoln Park High School (hereinafter "LPHS") and Stay In Touch, a community-based organization designed to assist men and women whose lives have been afflicted by substance abuse or alcoholism.[13] Applicant Ex. Nos. 8, 9, 14.

41. LPHS sent English and drama students to see applicant's productions. All attending students received study guides, that includes thematic questions and explanatory vocabulary lists, free of charge. They also participated in post-performance discussions with the actors and wrote critiques of the actors' performances, for which they received class credit from LPHS. Applicant Ex. No. 10; Tr. pp. 12, 15.

42. Applicant's outreach programs include scholarship subscriptions, visiting artists and an annual tour of Chicago-area high schools. Applicant Ex. No. 8.

43. Schools participating in the annual tour, wherein VGT performs one of its productions at various schools, include LPHS, King High School, Dunbar Vocational High School, Montefiore Special School, and Chicago Vocational High School.[14] Applicant Ex. No. 8; Tr. p. 13.

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13. For an exhaustive listing of those involved in this program, *see*, Applicant Ex. No. 8, pp. 5, 11.

14. For an exhaustive listing of participants, *see*, Applicant Ex. No. 8.

44. The scholarship subscription program provides inner-city high school students with season's tickets to the five productions that applicant presents in its lower-level main theater. Applicant provided 357 such subscriptions, having a value of $52.00 apiece, during its 1994-1995 and 1995-1996 fiscal years. Applicant Ex. Nos. 8, 9.

45. Schools participating in the scholarship subscription program included Austin Community Academy, Evanston Township High School, Josephinium High School, Manley High School and Lake View High School.[15] Applicant Ex. No. 8.

46. The visiting artists program is one in which actors or other artists affiliated with VGT work with teachers and students from LPHS. Their goal is to integrate arts programming into the general curriculum by means such as advising LPHS drama students, (who must submit an original one-act play as part of their curriculum), about technical aspects of play writing. Applicant Ex. No. 8; Tr. pp. 13-14.

47. Applicant provides these and all other services connected with the visiting arts program free of charge. *Id.*

48. VGT also provides personnel that assist with teacher training in theater techniques for classroom management at LPHS, Montefiore Special School, and Chicago Vocational High School. Applicant Ex. No. 8.

49. Applicant also undertook an access project, which sought to make theater more accessible to the disabled, in June of 1995. Specific features of this program, which was funded by grants from Kraft and AT&T, include: (1) making the bathrooms and other parts of the building wheelchair accessible; (2) providing Braille programs and

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15. For an exhaustive listing of participants, *see, Id.*

audio descriptions (or narrations) for the visually impaired and infra-red amplification systems for the hearing impaired; (3) offering half-price tickets to persons on the Access Project list; and (4) presenting workshops, that are free of charge, for physically challenged writers who wish to work on play writing. Applicant Ex. Nos. 8, 14.

50. Applicant operates a Theater Center on the subject property. The purpose of this center is to provide instructional programs relating to the performing arts. Applicant Ex. No. 10.

51. Most of the programs offered at the Theater Center are eight week courses in subjects such as basic acting technique, improvisation, scenery, audition skills and play writing.[16] *Id*.

52. Applicant offered 325 such classes during the tax year in question, which encompassed its 1994-1995 and 1995-1996 fiscal years. Tr. p. 57.

53. Each course is taught by a local actor, director, musician or playwright with professional experience in the subject matter. Class size varies between 8 and 18 people. Tuition for each class ranges from $75.00 to $175.00 per class, with most courses costing $100.00 or more. Applicant Ex. No. 10.

54. Theater Center students must pay their tuition in full prior to the first class. They must also pay a non-refundable, non-transferable deposit of $50.00 in order to reserve their places in each class. Those who register and pay their deposits 10 business days before the first class of the session receive a discount of 15% off the balance due. *Id.*

16. For complete course listings and descriptions, *see*, Applicant Ex. No. 10.

55. Students who enroll in more than one course at a time receive a tuition discount of 20%. This discount applies to additional classes, so that the first class is at full price and all others are at the reduced rate. *Id*.

56. Applicant received a bequest from one of its board members, which enabled it to establish the Samuel Bernstein Scholarship, during 1995. This and other scholarships enable applicant to provide funding for three to four students who take classes at the Theater Center on an ongoing basis. Tr. pp. 57-58.

57. Applicant also offers a work study program wherein 24 qualifying students may exchange four hours of work per week for a 50% discount on one class. Interviews for this program are scheduled at the time of registration. Applicant Ex. No. 10; Tr. p. 57.

58. Applicant additionally invites Theater Center students to purchase subscriptions (or season's tickets) to VGT productions. Those subscribing receive a 50% discount on tickets for Tuesday or Wednesday evening performances or Sunday matinees. Those who do not are entitled to a $3.00 discount on all VGT productions or the half price student rush ticket. Applicant Ex. No. 10.

59. VGT employed six college interns during the 1995 assessment year. These interns came from a variety of area colleges, including the University of Chicago, DePaul University, Ohio University and Northwestern University. They received course credit, issued by the sponsoring institutions, for their work, which could focus on artistic, production or administrative matters. Applicant Ex. No. 10, p. 73; Tr. pp. 58, 63-66.

60. The University of Chicago and other institutions gave course credit for classes taken at the Theater Center during 1995. Tr. p. 65.

CONCLUSIONS OF LAW:

An examination of the record established this applicant has not demonstrated by the presentation of testimony or through exhibits or argument, evidence sufficient to warrant an exemption from property taxes for the 1995 assessment year. Accordingly, under the reasoning given below, the determination by the Department that the above-captioned parcel does not qualify for exemption under 35 **ILCS** 200/15-35 and 35 **ILCS** 200/15-65 should be affirmed. In support thereof, I make the following conclusions:

A. Constitutional and Statutory Considerations

Article IX, Section 6 of the Illinois Constitution of 1970 provides as follows:

> The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes.

The power of the General Assembly granted by the Illinois Constitution operates as a limit on the power of the General Assembly to exempt property from taxation. The General Assembly may not broaden or enlarge the tax exemptions permitted by the Constitution or grant exemptions other than those authorized by the Constitution. Board of Certified Safety Professionals, Inc. v. Johnson, 112 Ill.2d 542 (1986). Furthermore, Article IX, Section 6 is not a self-executing provision. Rather, it merely grants authority to the General Assembly to confer tax exemptions within the limitations imposed by the Constitution. Locust Grove Cemetery Association of Philo v. Rose, 16 Ill.2d 132 (1959). Moreover, the General Assembly is not constitutionally required to exempt any property from taxation and may place restrictions or limitations on those exemptions it chooses to grant. Village of Oak Park v. Rosewell, 115 Ill. App.3d 497 (1st Dist. 1983).

In furtherance of its Constitutional mandate, the General Assembly enacted the Property Tax Code, 35 **ILCS** 200/1-3 ***et seq***. The provisions of that statute which govern disposition of the present matter are contained in Sections 200/15-65 and 200/15-35. In relevant part, the former provides as follows:

> ... All property of the following is exempt when actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit:
>
> (a) institutions of public charity[.]

35 **ILCS** 200/15-65.

Section 200/15-35 provides, in relevant part, that:

> ... All property donated by the United States for school purposes, and all property of schools, not sold or leased or otherwise used with a view to profit, is exempt, whether owned by a resident or non-resident of this State or by a corporation incorporated in any State of the United States. Also exempt is:
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> (b) property of schools on which the schools are located and any other property of schools used by the schools exclusively for school purposes, including, but not limited to, student residence halls, dormitories and other housing facilities, and school owned and operated dormitory or residence halls occupied in whole or in part by students who belong to fraternities, sororities or other campus organizations.
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> (c) property donated, granted, received or used for public school, college, theological seminary, university, or other educational purposes, whether held in trust or absolutely.

35 **ILCS** 200/15-35.

B. The Burden of Proof

It is well established in Illinois that a statute exempting property or an entity from taxation must be strictly construed against exemption, with all facts construed and debatable

questions resolved in favor of taxation. People Ex Rel. Nordland v. Home for the Aged, 40 Ill.2d 91 (1968); Gas Research Institute v. Department of Revenue, 154 Ill. App.3d 430 (1st Dist. 1987). Based on these rules of construction, Illinois courts have placed the burden of proof on the party seeking exemption, and, have required such party to prove, by clear and convincing evidence, that it falls within the appropriate statutory exemption. Immanuel Evangelical Lutheran Church of Springfield v. Department of Revenue, 267 Ill. App.3d 678 (4th Dist. 1994).

C. The State of Title and Other Technical Limitations On Applicant's Exemption Claim

In People v. Chicago Title and Trust, 75 Ill.2d 479 (1979), (hereinafter "CT&T"), the Illinois Supreme Court held that the land trust beneficiary, and not the trustee, was the "owner of the property" for purposes of determining liability for real estate taxes. The CT&T court was interpreting Section 508(a) of the Revenue Act of 1939 (Ill. Rev. Stat. 1977, ch. 120, par. 508(a)) which provided that "... [t]he owner of real property on January 1 ... in any year shall be liable for taxes of that year."[17]

This record establishes that applicant did not acquire 100% of the beneficial interest in the subject property until August 3, 1995. As such, applicant was but a partial (53%) owner of said property during 59% of the 1995 assessment year that began January 1, 1995 and ended August 2, 1995. These facts are important because in Chicago Patrolmen's Association *et al* v. Department of Revenue, 171 Ill.2d 263 (1996), (hereinafter "CPA"), the Illinois Supreme Court held that the owner of a 50% beneficial interest in a land trust was entitled to "an exemption in an amount equal to the actual percentage of the property" that it owned.

This conclusion was partially facilitated by Departmental concessions establishing that the 50% beneficial interest holder, a museum, was a charitable organization and used the parcels in question for charitable purposes. The aforementioned rules governing applicant's burden of proof prohibit me from making such concessions in the instant case. However, the CPA holding exposes an important technical feature of this case, which is that applicant's exemption claim is: (1) initially limited to 53% of the subject property (and a proportionate amount of its underlying ground) for 59% of the 1995 assessment year; but then, (2) expands to 100% of the subject property (and a proportionate amount of its underlying ground) for the remaining 41%.[18]

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17. The relevant version of that provision, which for purposes of the present discussion is identical to Section 501(a), is found in 35 **ILCS** 200/9-175.

18. 53% of beneficial interest that applicant owned as of January 1, 1995 + 47% of beneficial interest applicant acquired on August 3, 1995 = 100% beneficial (ownership) interest during that 41% of the tax year in question that began August 3, 1995 and ended December 31, 1995.

VGT seeks to defeat this conclusion by arguing that the closing documents (Applicant Ex. Nos. 5, 7) prove that applicant was developing the upper level for exempt use throughout the entire 1995 assessment year. This argument fails because the exempt status of real estate is determined by its actual, rather than intended use. Skil Corporation v. Korzen, 32 Ill.2d 249 (1965); Comprehensive Training and Development Corporation v. County of Jackson, 261 Ill. App.3d 37 (5th Dist. 1994).

At best, the aforementioned evidence establishes only intended use, at least with respect to all periods that preceded the closing.[19] Even if it did not, the record contains absolutely no evidence that applicant undertook any physical adaptations, developments or renovations of the upper level prior to or after the closing date. Consequently, the present case is distinguishable from Weslin Properties v. Department of Revenue, 157 Ill. App.3d 580 (2nd Dist. 1987), where the court held in favor of exempting part of a parcel that appellant began developing for exempt use by engaging in construction of berms and landscaping during the tax year in question. For this and all the aforestated reasons, I conclude that the technical limitations articulated in CPA, *supra*, apply herein.

Another technical question raised by this case is whether any exemption applicant receives should be reduced to account for the leaseholds. This concern arises from the fundamental principle that the primary use of real estate, rather than its incidental use or uses, determines tax exempt status. Illinois Institute of Technology v. Skinner, 49 Ill.2d 59 (1971), (hereinafter "IIT"). While this principle provides a general framework for the ensuing analysis, our courts have recognized that it can be subject to variable applications in the following "distinct situations[:]"

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19. This time frame is important because applicant did not actually own the second floor prior to the date of closing. Consequently, it could not have satisfied the statutory ownership requirement contained in 35 **ILCS** 200/15-65. *See*, discussion of Methodist Old People's Home v. Korzen, 39 Ill.2d 149, 156 (1968), *infra* at p. 27.

> First is the case where the property as a whole, or in unidentifiable portions is used both for an exempting purpose and a non-exempting purpose. The property will be wholly exempt only if the former use is primary and the latter is merely incidental. [citations omitted]. In the second situation, an identifiable portion of the property may be exempt, while the remainder is taxable if it is a substantial rather than incidental portion of the property and is used for a non-exempting purpose or not at all. [citations omitted].

IIT at 66.

The IIT court applied these principles to a record which determined that only a portion of the 107-acre tract under consideration was actually used for exempt educational purposes. It exempted that specific portion and held that "[w]here a tract is used for two purposes, there is nothing novel in exempting the part used for an exempt purpose and subjecting the remainder to taxation." *Id*. at 64.

This record establishes that: (1) 3,300 square feet of the first floor (or 16.5% thereof) was leased to 2263 throughout the 1995 assessment year; (2) 2263 was, under terms of its lease, prohibited from using the leasehold for any purpose other than operating a commercial restaurant; (3) applicant obtained rental income from this restaurant lease during both its 1994-1995 and 1995-1996 fiscal year; (4) applicant presented four rental productions in the first floor studio theater, and derived income therefrom, during its 1994-1995 fiscal year; (5) applicant assumed the landlord's interest in two leaseholds, (both of which affected the second floor main stage theater and its adjacent dressing room), as part of the transaction wherein it obtained the remainder of CAF's beneficial interest in the subject property; (6) applicant derived rental income from both of these leaseholds; and (7) applicant derived rental income from the 9 rental productions which it presented in the two (upper and lower level) studio theaters during its 1995-1996 fiscal year.[20]

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20. The record fails to disclose how many or which specific rental productions were presented in the first level studio theater. It also does not contain any evidence establishing how many or which specific rental productions were presented in the second level studio theater. It does, however, contain evidence establishing that: (1) applicant presented only four rental productions in its first floor studio theater during the fiscal year ended June 30, 1995 (Applicant Ex. No. 8, p. 1); (2) applicant acquired ownership, possession and use of the second floor,

Applicant posits that these leaseholds were but incidental uses that supported what it alleges were applicant's overall exempt uses. This argument fails to recognize that the demised portions can be, and in fact have been, specifically identified from the evidence presented herein. Consequently, the primary/incidental distinction, which, per IIT, *supra*, pertains only to those situations where the non-exempt portions can *not* be so identified because they are part of an indivisible whole, is inapplicable herein. Therefore, the exempt status of these specifically identifiable portions depends, in part,[21] on whether the leaseholds themselves were used for appropriate purposes during any part of the 1995 assessment year.

That inquiry is governed by the holding in Children's Development Center v. Olson, 52 Ill.2d 332 (1972) (hereinafter "Olson"). There, the Illinois Supreme Court confronted a situation wherein a tax-exempt religious organization, the School Sisters of St. Francis, leased a portion of a former convent to the appellant, a tax-exempt "institution of public charity." *Id.*

The Court held in favor of exempting appellant's leasehold interest. In doing so, the Court reasoned that:

> It is not questioned that the activities conducted by the [appellant] Center are charitable and that if the property were owned by the Center and these activities conducted thereon [sic], it would be tax exempt. Also if Sisters were to conduct a similar operation instead of Center, it appears that the property would be tax exempt.

Id. at 334-335.

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including the two theaters contained therein, via an absolute assignment of beneficial interest dated August 3, 1995 (Applicant Ex. No. 5); and (3) "rental productions were increased [from 4 to 9 during the fiscal year beginning July 1, 1995] due to the acquisition of space." (Applicant Ex. No 5; Applicant Ex. No 8, p. 8).

This evidence indicates that the increased space enabled applicant to present rental productions in *both* of its studio theaters. Accordingly, I conclude that VGT presented all 9 rental productions in one of the two studio theaters (albeit at different yet unspecified times) during its 1995-1996 fiscal year.

21. Analysis, *infra* at p. 27 shall demonstrate that exempt use is but one of the elements that applicant must establish in order to obtain exemption under 35 **ILCS** 200/15-65.

The court then distinguished cases wherein exemptions were denied because the leased properties were primarily used for the non-exempt purposes of producing income and therefore generating a profit for the owner. People *ex. rel.* Baldwin v. Jessamine Withers Home, 312 Ill. 136 (1924); Turnverein "Lincoln" v. Board of Appeals of Cook County, 358 Ill. 135 (1934); City of Mattoon v. Graham, 386 Ill. 180 (1944). It asserted that courts in cases such as People *ex. rel.* Goodman v. University of Illinois Foundation, 388 Ill.2d 363 (1944) and People *ex. rel.* Hesterman v. North Central College, 336 Ill. 263 (1929) allowed exemptions because "the primary use of the leased property, while yielding incidental income, was to serve a function connected with the tax-exempt purpose of the institution." Olson, *supra* at 335-336. Thus:

> … We need go no further than the drawing of this distinction for the decision of this case. It is unnecessary through accounting procedures to ascertain whether Sisters actually made a profit from the leasing. That is not the test. This court has often held that it is the primary use of the property and not the ownership that determines its taxable status. [citations omitted].
>
> We likewise consider that it is the primary use to which the property is devoted *after the leasing* which determines whether the tax-exempt status continues. If the primary use is for the production of income, that is, "with a view to profit," the tax exempt status is destroyed. Conversely, if the primary use is not for the production of income but to serve a tax-exempt purpose the tax exempt status of the property continues though the use may involve the incidental production of income. Following the leasing, the primary use to which the property was devoted was serving the tax-exempt charitable purpose of the Center. This did not destroy the tax-exempt status of the leased property although the letting produced a return to Sisters.

Olson, *supra* at 336. [emphasis added].

In order to apply these principles to the present case, one must first ascertain whether both the applicant-lessor *and* each of the lessees qualify as tax-exempt entities. If, however, one or both entities do not so qualify, then one need not proceed to the second line of inquiry, which is whether the post-leasing uses furthered one or more exempt purposes.

Here, the initial part of the first inquiry hinges on whether applicant itself qualifies as an "institution of public charity" within the meaning of Section 200/15-65 and/or a "school" within the meaning of Section 200/15-35. This query, in turn, depends on whether applicant's primary function is to present theatrical presentations or provide instruction in the dramatic arts.

The starting point for this analysis is applicant's organizational documents. Said documents reveal that VGT is "organized and operated exclusively for charitable, literary and scientific purposes …" with an emphasis on the dramatic arts. However, "statements of the agents of an institution and the wording of its governing documents evidencing an intention to [engage in exclusively exempt activity] do not relieve such an institution of the burden of proving that ... [it] actually and factually [engages in such activity]." Morton Temple Association v. Department of Revenue, 158 Ill. App. 3d 794, 796 (3rd Dist. 1987). For this reason, it is appropriate to discern VGT's primary function via examination of its financial structure and the business reality of its actual operations.

The audited financial statements admitted as Applicant Ex. No. 1 prove that VGT spent no less than 65% of its total expenses on theater operations. Said statements further prove that applicant spent no more than 3% to 4% of its total expenditures on the Theater Center, which is the instructional component of its programming.

Furthermore, the information sheet which appears on page 72 of Applicant Ex. No. 8 indicates that VGT "is a non-for profit *professional theater organization* created to serve the people of metropolitan Chicago …[.]" (Emphasis added). Based on this and the other aforementioned evidence, I conclude that: (1) VGT's primary function is presenting professional theater productions; and (2) applicant's instructional endeavors are incidental thereto. Therefore, it seems appropriate to focus the ensuing analysis on whether applicant's property qualifies for exemption under provisions that pertain to "institutions of public charity," 35 **ILCS** 200/15-65.

D. The Charitable Exemption

A party seeking exemption under Section 200/15-65 and its predecessor provisions must prove that: (1) the property in question is owned by an "institution of public charity[;]" and, (2) said property is "exclusively used" for purposes that qualify as "charitable" within the meaning of Illinois law. Methodist Old People's Home v. Korzen, 39 Ill.2d 149, 156 (1968) (hereinafter "Korzen"). In order to determine whether applicant has sustained its burden of proof with respect to these propositions, one must consider the following definition of "charity[,]" originally articulated in Crerar v. Williams, 145 Ill. 625, 643 (1893):

> ... a charity is a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, persuading them to an educational or religious conviction, for their general welfare - or in some way reducing the burdens of government.

One must also consider the following "distinctive characteristics" common to all "institutions of public charity":

1) they have no capital stock or shareholders;

2) they earn no profits or dividends, but rather, derive their funds mainly from public and private charity and hold such funds in trust for the objects and purposes expressed in their charters;

3) they dispense charity to all who need and apply for it;

4) they do not provide gain or profit in a private sense to any person connected with it; and,

5) they do not appear to place obstacles of any character in the way of those who need and would avail themselves of the charitable benefits it dispenses.

Korzen at 157.

1. Applicant's Exempt Status

The leading case on the charitable status of arts organizations, such as applicant, is Du Page Art League v. Department of Revenue, 177 Ill. App.3d 895 (2nd Dist. 1988) (hereinafter

"Du Page Art League"). There, the court reversed a lower court's decision holding that the Art League's property qualified for exemption under the then-applicable version of Section 200/15-65.[22]

The appellate court began its analysis by noting that while "[a]n art studio or art gallery established for the benefit of the public for the advancement of education in art *can* be a charity," such studio or art gallery can not be exempt from real estate taxes unless it proves conformity with the criteria articulated in Korzen. (emphasis added). Du Page Art League, *supra* at 900, citing Mason v. Bloomington Library Association, 237 Ill. 442, 449 (1909).

The court held that the Art League did not satisfy at least four of those criteria, namely (1) charity was not "dispensed to all who need and apply for it[;]" (2) obstacles were placed in the way of those who attempted to avail themselves of the charity; (3) the Art League's members impermissibly profited from the enterprise; and (4) applicant's revenues came from tuition, membership fees and commissions from the sale of art rather than sources specified in Korzen. Du Page Art League, *supra* at pp. 900-902.

With respect to the first two criteria that the Art League did not satisfy, the court noted that only one of plaintiff's 513 dues-paying members was not required to pay dues because of an inability to pay. *Id.* at 900. It also observed that "nothing in plaintiff's by-laws requires it to waive membership dues or tuition because of an inability to pay" (*Id*, citing Korzen, *supra* at 159) and that "[n]one of plaintiff's brochures informs the public that plaintiff's benefits are available without charge in a proper case." *Id.* at 900-901, citing Highland Park Hospital v. Department of Revenue, 155 Ill. App.3d 272, 280-281 (2d Dist. 1987), (hereinafter "HPH").[23]

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22. That version was found at Ill. Rev. Stat. 1987, ch. 120, ¶ 500.7.

23. The HPH case involved a health care center that circulated advertisements to promote the center's services. Among other things, these advertisements described the available

The court next noted that the Art League's active members impermissibly profited from its operations in that they were the only ones permitted to show their work in the art gallery. More importantly, the Art League required that these members offer their works for sale and allowed them to retain 80% of any sale proceeds. Under these circumstances, the court concluded that the Art League's "members gain a distinct advantage not afforded to non-members by the opportunity to sell, promote, and familiarize the community with their work." *Id*. at 901.

The present case has much in common with DuPage Art League. For instance, applicant's Articles of Incorporation and by-laws are completely devoid of any reference to fee or tuition waivers. Nor does the Catalogue of Courses (submitted as part of Applicant Ex. No. 10) mention anything about the scholarships, work study programs or internships which applicant posits provide evidence of its exempt operations.

Furthermore, neither this catalogue nor any of the programs (submitted as another part of Applicant Ex. No. 10) contain even the faintest reference to other potentially "charitable" aspects of applicant's operations, such as its discount ticket policies or ticket giveaways. Indeed, the *internal* memos that describe the substance of VGT's ticket discount policies (Applicant Ex. No. 10, pp. 73, 74) are addressed to applicant's box office staff, *not* the general public. Consequently, it seems all but factually impossible for members of the public to know about, and therefore avail themselves of, any discounts or other benefits set forth therein. HPH, *supra* at 280.

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services and set forth appellant's hours. They also advised that care was available without appointment and that services were provided on a low-cost basis when compared to other facilities. However, the advertisements did not mention that free care was available to those unable to pay. The court viewed this omission as a failure of proof because it raised doubts as to whether members of the general public in fact knew free care was available at the facility. HPH at 280.

This record also demonstrates that expenditures associated with VGT's reduced or free ticket policies were clearly incidental to those connected with its overall theater operations during the 1995 assessment year. That year, which ran from January 1, 1995 until December 31, 1995 per 35 **ILCS** 200/9-175,[24] encompassed the last six months of applicant's 1994-1995 fiscal year and continued through the first six months of its ensuing fiscal year.

Applicant incurred $667,532.00 in theater-related expenses during the first of these two fiscal years. However, the following table demonstrates that VGT's ticket giveaways, subsidies and scholarship subscriptions were but a small portion of such expenses:

ACTIVITY	**ASSOCIATED EXPENSE**	**% OF TOTAL THEATER EXPENSES**
Ticket Giveaways	$ 3,135.00	Less than one half of 1%[25]
Subsidized Tickets	$13,410.00	2%[26]
Scholarship Subscription	$18,564.00	3%[27]
Total of All Three	$35,109.00	**5%**[28]

Analysis of data from applicant's 1995-1996 fiscal year, in which total theater expenses were $838,170.00, reveals a similar pattern:

ACTIVITY	**ASSOCIATED EXPENSE**	**% OF TOTAL THEATER EXPENSES**
Ticket Giveaways	$ 3,135.00	Less than one half of 1%[29]
Subsidized Tickets	$13,410.00	1.6%[30]

24. For a analysis of that provision and its impact on this case, see discussion of People v. Chicago Title and Trust, 75 Ill.2d 479 (1979), *supra* at p. 21.

25. $3,135.00/$667,532.00 = 0.0047 (rounded) or less than one half of 1%.

26. $13,410.00/$667,532.00 = 0.0201 (rounded) or approximately 2%.

27. $18,564.00/$667,532.00 = 0.0278 (rounded) or approximately 3%.

28. $3,135.00 + $13,410.00 + $18,564.00 = $35,109.00;
$35,109.00/$667,532.00 = 0.0526 (rounded) or approximately 5%.

29. $3,135.00/$838,170.00 = 0.0037 (rounded) or less than one half of 1%.

30. $13,410.00/$838,170.00 = 0.0159 (rounded) or approximately 1.6%.

Scholarship Subscription	$18,564.00	2.2[31]
Total of All Three	$35,109.00	**4.2%**[32]

These computations reveal that applicant's "charitable" disbursements for 1995 assessment were *de minimus.* Thus, while certain aspects of VGT's endeavors may qualify as being "charitable" or "beneficent," such aspects clearly were not the *primary* focus of applicant's overall operations during the assessment year in question. Rogers Park Post No. 108 v. Brenza, 8 Ill.2d 286 (1956); Morton Temple Association v. Department of Revenue, 158 Ill. App.3d 794 (3rd Dist. 1987); Albion Ruritan Club v. Department of Revenue, 209 Ill. App.3d 914 (5th Dist. 1991).

The above conclusion also draws support from the substance of applicant's ticket discount policies. According to the internal memos submitted as part of Applicant Ex. No. 10, these policies only apply to performances given in the lower level mainstage theater. Consequently, I must infer that applicant did not employ such policies to effectuate discounts or ticket giveaways for productions given in: (1) its lower level studio theater during the entire 1995 assessment year; and/or (2) either of the upper level theaters after applicant obtained the remainder of CAF's beneficial interest in the subject property.

Furthermore, the testimony of VGT's managing director, Marcelle McVay, establishes that, regardless of their applicability, these policies were always "subject to availability." (Tr. pp. 51-52). Under the above rules requiring that all inferences support taxation,[33] this statement

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31. $18,564.00/$838,170.00= 0.0221 (rounded) or approximately 2.2%.

32. $3,135.00 + $13,410.00 + $18,564.00 = $35,109.00;
$35,109.00/$838,170.00= 0.0419 (rounded) or approximately 4.2%.

33. *See, supra,* at p. 20.

must be interpreted as proving that applicant's ticket giveaway and discount policies are primarily attuned to the business-related concern of cutting financial losses associated with unsold tickets. If this were not the case, applicant probably would not have reduced the window of opportunity for "Rush" students to purchase discount tickets by a full half-hour.[34]

Business reality dictates that the natural consequence of this reduction, whether intended or not, is to increase applicant's chances of selling additional full-price tickets. Given this consideration, and the absence of evidence establishing exactly how many "Community Nights" applicant held during the 1995 assessment year, I conclude that applicant's operations are geared primarily toward presenting professional theater presentations to those who can afford to purchase full-price theater tickets rather than accommodating those who cannot.

I also find it significant that applicant presented little if any evidence as to the process whereby it selects the theater groups, playwrights or other artisans that perform in its theaters. In DuPage Art League, *supra*, the court indicated that charitable status can be destroyed if

34. See, Findings of Facts 36-37, *supra* at pp. 13-14.

such persons impermissibly profit from applicant's enterprise. This record does not reveal the precise nature and extent of any pecuniary rewards that the performers may obtain. It does, however, contain evidence indicating that VGT presents one non-rental production per season and leases theater space to various groups who perform at its facility. These factors strongly suggest that VGT employs some sort of selection process that (if nothing else) effectively permits it to confer intangible benefits, such as exposure to audiences in a major metropolitan area, on those it selects.

Applicant cannot confer these benefits on persons or groups it does not select. Thus, one could fairly infer that: (1) the artisans who perform at the subject property profit from applicant's enterprise: (2) applicant does not "dispense charity to all who need and apply for it," as required by Korzen, *supra*, because the practical effect of its selection procedures, whatever they may be, is to prevent non-chosen artisans or theater groups from performing at applicant's facility; and, (3) VGT appears to place obstacles in the way of those who seek and would avail themselves of the benefits it dispenses, in violation of Korzen, *supra*, for the same reason.

Based on all the aforestated considerations, I conclude that VGT does not qualify as an "institution of public charity" within the meaning of Section 200/15-65 of the Property Tax Code. Therefore, that portion of the Department's determination which denied exemption from 1995 real estate taxes based on lack of exempt ownership should be affirmed.

2. Use Issues

This record also contains substantial evidence establishing that the subject property was not "actually and exclusively used for charitable or beneficent purposes," as required by Section 200/15-65, during the 1995 assessment year. Such evidence stems from the leases under which

applicant demised various portions of the subject property to different entities during some or all of the tax year in question.

Analysis found *supra* at pp. 24-25 demonstrates that the leading case on this particular factual scenario is Children's Development Center v. Olson, 52 Ill.2d 332 (1972) There, the Illinois Supreme Court held that exemption of leaseholds will be sustained where all three of the following propositions are proven by clear and convincing evidence: (1) the lessor qualifies as an exempt entity; (2) the lessee also qualifies as an exempt entity; and (3) the lessee uses the demised premises for purposes that would qualify as exempt if the lessee owed the property it is seeking to exempt, provided that neither the lessor nor the lessee are profiting from the enterprise.

My previous analysis demonstrates that this applicant does not qualify as an "institution of public charity." Nor does VGT qualify as a "school" within the meaning of 35 **ILCS** 200/15-35. Consequently, I must conclude that the subject property does not qualify for exemption under Olson because applicant, itself, is not an exempt lessor.

Moreover, this record does not support the conclusion that any of applicant's lessees qualified for exempt status. While VGT offered little, if any evidence on this point, the proofs it did submit establishes that: (1) the restaurant lessee, 2263, was an "Illinois Corporation[;]" and (2) at least two the upper level studio lessees, Dienstag and Noble, were private individuals. Applicant Ex. Nos. 4, 5

The aforementioned rules governing VGT's burden of proof require that all inferences support taxation and that all unproven, disputed or doubtful matters be resolved against the applicant. Thus, in the absence of other appropriate evidence, I must conclude that 2263 was a non-exempt, for-profit corporation which carried on an equally non-exempt commercial

enterprise that served 2263's own pecuniary interest in the space it rented from applicant. *Accord*, People ex. rel. Baldwin v. Jessamine Withers Home, 312 Ill. 136, 140 (1924); Salvation Army v. Department of Revenue, 170 Ill. App.3d 336, 344 (2nd Dist. 1988). In this sense, the present case is distinguishable from Highland Park Women's Club v. Department of Revenue, 206 Ill. App.3d 447 (2nd Dist. 1991) (hereinafter "HPWC"), wherein the portions found to be exempt were exclusively used for the non-commercial purpose of furthering an overall charitable endeavor. HPWC, *supra,* at 464.[35]

I must likewise conclude that Dienstag and Noble were non-exempt private individuals and that applicant failed to prove that the other theater lessees, including the Buffalo Theater Ensemble, the Ben Hecht Company and Roadworks Productions, were exempt entities. Given these considerations, it seems unnecessary to engage in protracted analysis of the use issue. However, it does bear noting that the both the restaurant and theater leases contain provisions authorizing applicant to oust the respective lessees in the event they fail to make timely rental payments or default on same.

Such provisions are more consistent with those found in commercial leasing arrangements because they "lack the warmth and spontaneity indicative of charitable impulse." Korzen, *supra* at 158. Consequently, for all the aforestated reasons, I conclude that the subject property was not "actually and exclusively used for charitable or beneficent purposes," as required by 35 **ILCS** 200/15-65. Therefore, that portion of the Department's determination that denied exemption based on lack of exempt use should be affirmed.

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35. For additional analysis of HPWC and its impact on this case, *see, infra* at pp. 41-42.

E. The School Exemption

Before addressing the substance of applicant's contention that it its property is entitled to exemption under Section 200/15-35 of the Property Tax Code, I must re-emphasize that the uses associated with the VGT's Theater Center are, per applicant's financial statements, clearly incidental to those affiliated with its non-exempt theater operations. Thus, VGT does not satisfy the exclusive use requirement contained in Section 200/15-35(b).

Of greater importance, however, is the fact that applicant qualifies as a "school," at least for Property Tax purposes. Nor does it satisfy the criteria which our courts have established for the exemption of "schools," first among which is establishing conformity with the following definition:

> A school, within the meaning of the Constitutional provision, is a place where systematic instruction in useful branches is given by methods common to schools and institutions of learning, which would make the place a school in the common acceptation [sic] of the word.

People ex rel. McCullough v. Deutsche Evangelisch Lutherisch Jehova Gemeinde Ungeanderter Augsburgischer Confession, 249 Ill. 132 (1911); People v. Trustees of Schools, 364 Ill. 131 (1936); People ex rel Brenza v. Turnverein Lincoln, 8 Ill.2d 188 (1956), (hereinafter "Brenza").

Our courts have also articulated the following economically-based policy rationale for the exemption of "schools:"

> It seems clear from the foregoing that this constitutional tax exemption for private educational institutions was intended to extend only to those private institutions which provide at least some substantial part of the educational training which otherwise would be furnished by publicly supported schools, academies, colleges and seminaries of learning and which, to some extent, thereby lessen the tax burden imposed upon our citizens as the result of the public educational system.

Brenza, *supra* at 202-203.

Illinois courts have also held that a private instructional institution, such as applicant, cannot obtain an exemption from real estate taxes unless it establishes two propositions by clear

and convincing evidence: first, that it offers a course of study which fits into the general scheme of education established by the State; and second, that it substantially lessens the tax burdens by providing educational training that would otherwise have to be furnished by the State. Illinois College of Optometry v. Lorenz, 21 Ill. 219 (1961), (hereinafter "ICO").[36]

In ICO, the court began analyzing whether applicant's optometry school satisfied the above criteria by noting that "The Illinois Optometric Practice Act has expressly declared that the practice of optometry in this State affects the public health, safety and welfare ...[.]" ICO, *supra* at 219. The court further observed that the General Assembly intended "to elevate the practice of optometry to that of a profession or skilled occupation similar to the practice of medicine, surgery or dentistry." *Id*.

Neither CAF nor VGT cited any authority establishing, and my research has failed to disclose, any legislative declaration pertaining to the theater arts which is akin to the one found in ICO regarding the practice of optometry. Absent such a declaration, and without authority establishing that the General Assembly intended to elevate the theater arts "to a profession or skilled occupation," I must conclude that ICO, in which the court allowed exemption, is factually distinguishable from the instant case.

Applicant also offered absolutely no evidence to establish that it was an accredited "school" during the tax year in question. Absent this evidence, I must conclude, as did the court in Winona School of Professional Photography v. Department of Revenue, 211 Ill. App.3d 565, 570 (1st Dist. 1991) (hereinafter "Winona"), that VGT does not offer "systematic instruction in useful branches of leaning by methods common to institutions of learning." Winona at 571.

The aforementioned evidentiary deficiencies are not cured by the Catalogue of Classes submitted as part of Applicant Ex. No. 10. This document establishes that courses taught at the

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36. *See also*, Coyne Electrical School v. Paschen, 12 Ill.2d 387 (1957); Board of Certified Safety Professionals of the Americas v. Johnson, 112 Ill. 2d 542 (1986); American College of Chest Physicians v. Department of Revenue, 202 Ill. App. 3d. 59 (1st Dist. 1990); Yale Club of Chicago v. Department of Revenue, 214 Ill. App. 3d 468 (1st Dist, 1991).

Theater Center run for a maximum of eight weeks. Consequently, it appears that such courses are, in realty, short-term lessons that do not fit into any prescribed course of study. American College of Chest Physicians v. Department of Revenue, 202 Ill. App.3d 59 (1st Dist. 1990); Winona, *supra*. Therefore, I conclude that such courses are not "equally as comprehensive and exacting" as those taught in public universities. ICO, *supra* at 223.

The Catalogue of Classes also proves that the instructors who teach at applicant's Training Center are local actors, playwrights, etc. with professional experience in the relevant subject matter. These qualifications may establish that applicant's instructors possess whatever skills are necessary to impart their knowledge of the subjects they teach. It does not, however, establish that these instructors are qualified to teach in State-authorized schools. Coyne Electrical, *supra*, at 391.

Applicant seeks to defeat these conclusions by arguing that its visiting artists, school tour, work study and internship programs provide evidence of exempt use. This argument fails to recognize that applicant *itself* does not set the curriculum under which students participate in these programs. Nor does it issue course credit for any work done in these programs. That work is ostensibly done by the schools themselves and/or their respective governing boards, none of which are the applicant herein. For this and all the aforementioned reasons, I conclude that the subject property does not qualify for exemption under Section 200/15-35. Therefore, any portions of the Department's determination based on the same conclusion should be affirmed.[37]

F. Other Considerations Affecting Applicant's Lack of Exempt Status

37. In spite of the above conclusion, it should not escape mention that certain aspects of the Theater Center's Operations are distinctly non-charitable. For instance, students must pay their tuition in full prior to the first class and cannot reserve a place in any course they wish to attend except upon payment of a *non-refundable* deposit of $50.00. In addition, the Catalogue of Classes does not mention any scholarships that applicant may offer. Therefore, applicant has not proven those intended to benefit therefrom knew that the scholarships available and that the scholarships were distributed to all who needed and applied for them. *See, supra* at pp. 27, 29-30.

Applicant's exemptions from federal income, Illinois Use and other non-related taxes[38] do not alter the preceding conclusions. These exemptions do not establish that the subject property was actually used for exempt purposes during the year in question. People ex rel. County Collector v. Hopedale Medical Foundation, 46 Ill.2d 450 (1970). Furthermore, while the exemption from federal income tax establishes that applicant is an exempt organization for purposes of the relevant Sections of the Internal Revenue Code, these Sections do not preempt any of the exemption provisions contained in the Property Tax Code.

Furthermore, applicant's exemption from Illinois Use and related sales taxes was based on the Department's conclusion that applicant qualified as a "not-for-profit 501(c)(3) organization for the presentation of musical or theatrical works." (Applicant Ex. No. 6). The Property Tax Code does not specifically exempt such organizations. Rather, the relevant provisions thereof exempt only: (1) property owned by "institutions of public charity" that is actually and exclusively used for charitable or beneficent purposes; and, (2) property of entities that qualify as "schools," provided that said entities use the property exclusively for "school" purposes.

38. I use the adjective "non-related" to connote the statutory, conceptual and functional differences between the *ad valorem* real estate taxes presently under review and the federal income, State use and other related sales taxes which are not at issue herein even though applicant is exempt therefrom.

The preceding analysis demonstrates that applicant does not qualify as an "institution of public charity" or a "school". Said analysis further demonstrates that the subject property is not "exclusively used" for exempt purposes. Therefore, applicant's exemption from Illinois Use and related taxes is not dispositive of its entitlement to exemption herein.

G. Uniformity and Equal Protection

Applicant's final argument is that the above-stated denials violate its equal protection rights and the principle of Uniformity articulated in Article IX, §4(a) of the Illinois Constitution. Much of its argument rests on exemptions which the Department has granted to properties which applicant alleges are similar to its own. Specifically, applicant cites The Performance Community v. Illinois Department Of Revenue, Docket No. 90-16-1193; E.T.A. Creative Arts Foundation v. Illinois Department Of Revenue, Docket No. 85-16-210 and Steppenwolf Theater Company v. Illinois Department Of Revenue, Docket No. 90-16-1061.

The Department granted these exemptions pursuant to its findings that the applicants therein qualified as "institution[s] of public charity". However, I have emphatically demonstrated that this applicant does not qualify for exempt status, either as an "institution of public charity" or a "school". Therefore, VGT does not satisfy the fundamental requirement of being similarly situated to the allegedly preferred entities. Board of Certified Safety Professionals v. Johnson, 112 Ill.2d 542, 548 (1986).

It also bears noting that the Creative Arts Foundation and Steppenwolf applicants were granted exemptions at the administrative level, and thus, did not have to resort to the hearings process. VGT attempted to introduce documentary evidence that these entities submitted to the Department. However, I rejected these documents as hearsay because they did not qualify as records kept in the ordinary course of *this applicant's* business. (Tr. p. 78). Accordingly, these aspects of applicant's equal protection and uniformity arguments fail for lack of competent evidence.

I additionally find the Performance Company case to be distinguishable from the present matter. There, applicant waived or reduced theater rentals in cases of need. Here, the record establishes that VGT's charges "relatively modest" theater rental fees. (Applicant Ex. No. 8). The testimony of Marcelle McVay, at Tr. pp. 74-75, may prove that these are fees are lower than those charged by other local theatrical organizations. Nonetheless, neither this testimony nor any other evidence of record proves that this applicant ever waived its theater rental fees in cases of need. Rather, the theater leases submitted as part of Applicant Ex. 5, which authorize applicant to evict a tenant for non-payment of rent, support the opposite inference.

The Performance Company also *required* those that leased its theaters to make free tickets available for a program whereby applicant gave away tickets to various community groups. This record contains absolutely no evidence establishing that VGT imposes a similar requirement on its theater lessees. In addition, my comments *supra*, at pp. 32-33, establish that this applicant did not employ its free or reduced ticket policies to effectuate discounts or ticket giveaways in *all four* theaters during relevant portions of the 1995 assessment year. Based on this and all the aforementioned distinctions, I conclude that applicant's reliance on The Performance Company is misplaced.

Applicant also cites Highland Park Women's Club v. Department of Revenue, 206 Ill. App.3d 447 (2nd Dist. 1991) (hereinafter "HPWC"), a case wherein the primary issue was one not raised herein, that being whether a private citizen/taxpayer had standing to challenge tax exemptions granted to the Highland Park Women's Club and the Ravinia Festival Association (hereinafter "Ravinia") for the 1985 tax year. The court held in the negative[39] and then proceeded to analyze whether lands used for food stands and a gift shop qualified for exemption under the then applicable-version of Section 200/15-65.[40]

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39. Those interested in the court's analysis of that issue are referred to HPWC, *supra*, at 455-463.

40. That version was found in Ill. Rev. Stat. 1985, ch. 120, ¶ 500.7.

The court held in favor of exempting these lands on grounds that they were incidental to Ravinia's overall charitable purpose. However, its holding and reasoning are inapplicable herein, primarily because the Department (via this Recommendation for Disposition) has *not* concluded that VGT qualifies as a charitable organization. HPWC, *supra* at 447. Thus, any comparisons between this applicant's operations, (in which dispensing "charity" is incidental to the non-exempt aspects of its theater operations), and those of Ravinia are illusory at best. Even if they are not, one can still distinguish HPWC on grounds that the record in that case contained no evidence establishing that those who performed at Ravinia did so pursuant to non-exempt leasing arrangements. HPWC, *supra* at 453.

Analysis, *supra* at pp. 34-35, demonstrates that numerous features of applicant's leasing arrangements, (under which applicant demised theater and other space to different groups performed at its facilities), are strongly indicative of non-exempt use. Due to this lack of exempt use, I cannot recommend that the subject parcel be exempt from 1995 real estate taxes. Therefore, a finding that applicant is similarly situated to Ravinia, (if only in the sense that it qualifies as an "institution of public charity") is: (1) unwarranted from the present record; and (2) of no impact on the ultimate result herein because this record clearly demonstrates that VGT's exemption claim fails for lack of exempt use.

Applicant also relies on Walsh v. Property Tax Appeal Board, 181 Ill.2d 228 (1998). There, the Illinois Supreme Court held that certain assessment practices employed by the Tazewell County Board of Review violated the Uniformity Clause contained in Article IX, Section 4 of the Illinois Constitution of 1970. The specifics of these practices are not relevant herein except that they consisted of two distinct methodologies for calculating assessed values on similarly situated properties. Thus, the court held that the Board's practice of valuing one property according to a certain methodology, but then assessing those similarly situated according to another, violated Uniformity in that the assessment variances attributable thereto unconstitutionally increased the tax burden of those whose properties were not assessed according to the first method. Walsh, *supra*, at 235.

The lesson of Walsh is that assessment authorities "must use the same basis for determining assessed valuations for *all like properties*." *Id*, citing Kankakee County Board of Review v. Property Tax Appeal Board, 131 Ill.2d 1,20 (1989) (emphasis added). However, this principle does not apply herein, primarily because VGT is presently seeking a property tax exemption rather than relief from excessive valuations attributable to unconstitutional assessment practices. Furthermore, unlike the aggrieved taxpayers in Walsh, this applicant is *not* similarly situated to Ravinia or any of the other entities against which it seeks to measure its uniformity claim. Consequently, its property is not "like" those that the Department has previously found to be exempt. Accordingly, applicant's reliance on Walsh is misplaced. Therefore, for all the aforestated reasons, its equal protection and uniformity arguments fail.

H. Summary

In summary, the subject property does not qualify for exemption from 1995 real estate taxes because applicant fails to satisfy the ownership and use requirements established in Section 200/15-65. Nor does it fulfill the statutory and common law prerequisites necessary to qualify for exemption under Section 200/15-35. For these reasons, and because applicant's property is not similarly situated to others previously found to be exempt, the Department's determination denying it exemption from 1995 real estate taxes should be affirmed.

WHEREFORE, for the reasons stated above, it is my recommendation that real estate identified by Cook County Parcel Index Number 14-33-110-003 not be exempt from 1995 real estate taxes.

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Alan I. Marcus Date
Administrative Law Judge